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In The
Supreme Court of the United States

October Term, 1994

SAMUEL LEWIS, *et al.*,

Petitioners,

v.

FLETCHER CASEY, JR., *et al.*,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF AMICI CURIAE STATES OF
CALIFORNIA, ALASKA, FLORIDA, HAWAII,
IDAHO, KENTUCKY, MASSACHUSETTS,
MICHIGAN, MINNESOTA, MONTANA, NEVADA,
NEW JERSEY, NEW YORK, OHIO, OREGON,
RHODE ISLAND, UTAH AND VERMONT
IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the district court's order in this "access to courts" case, which greatly expanded the State of Arizona's financial and administrative burdens and shifted much of the management of the state's prison system to the federal judiciary, exceeds the constitutional requirements set forth in *Bounds v. Smith*, 430 U.S. 817 (1977).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
INTEREST OF THE AMICI CURIAE	1
REASONS FOR GRANTING THE PETITION	4
Introduction	4
CONCLUSION	14

TABLE OF AUTHORITIES

	Page
CASES	
Bee v. Utah State Prison, 823 F.2d 397 (10th Cir. 1987).....	10
Bell v. Wolfish, 441 U.S. 520 (1979).....	12
Bounds v. Smith, 430 U.S. 817 (1977).....	<i>passim</i>
Carter v. Fair, 786 F.2d 433 (1st Cir. 1986).....	10
Casey v. Lewis, 43 F.3d 1261 (9th Cir. 1994)	1, 7, 8, 9, 11, 12
Cruz v. Hauck, 627 F.2d 710 (5th Cir. 1980)	9
Hooks v. Wainwright, 775 F.2d 1433 (11th Cir. 1985), cert. denied, 479 U.S. 913 (1986).....	5, 8
Johnson v. Avery, 393 U.S. 483 (1969)	6
Knop v. Johnson, 977 F.2d 996 (6th Cir. 1992), cert. denied, Knop v. McGinnis, ___ U.S. ___, 113 S.Ct. 1415 (1993).....	8
Murray v. Giarratano, 492 U.S. 1 (1989)	6
Pennsylvania v. Finley, 481 U.S. 551 (1987)	6
Peterkin v. Jeffes, 855 F.2d 1021 (3d Cir. 1988).....	11
Procunier v. Martinez, 416 U.S. 396 (1974).....	6
Ross v. Moffitt, 417 U.S. 600 (1974)	5
Sands v. Lewis, 886 F.2d 1166 (9th Cir. 1989).....	11
Shango v. Jurich, 965 F.2d 289 (7th Cir. 1992)	11
Toussaint v. McCarthy, 801 F.2d 1080 (9th Cir. 1986), cert. denied, 481 U.S. 1069 (1987).....	9
Turner v. Safley, 482 U.S. 78 (1987).....	9, 10, 12

TABLE OF AUTHORITIES – Continued

	Page
Valentine v. Beyer, 850 F.2d 951 (3d Cir. 1988).....	9
Vandelft v. Moses, 31 F.3d 794 (9th Cir. 1994)	11
Williams v. Leeke, 584 F.2d 1336 (4th Cir. 1978), cert. denied, 441 U.S. 911 (1979)	9
Wolff v. McDonnell, 418 U.S. 539 (1974).....	5, 6, 10

INTEREST OF THE AMICI CURIAE

This brief in support of the Petition for Writ of Certiorari filed by prison officials of the Arizona Department of Corrections, is submitted on behalf of the State of California and the other signature States ("the Amici States") through their Attorneys General pursuant to Supreme Court Rule 37.5. The Amici States have an important interest in this case because they all operate correctional facilities in which they must assist the persons whom they incarcerate in obtaining access to courts.

The Court of Appeals for the Ninth Circuit has affirmed an order of the District Court of Arizona which would dramatically expand the physical access to law libraries that states must allow prisoners, the legal materials they must be provided, and the legal assistance from highly qualified individuals which must be available to all prisoners, even literate prisoners who have physical access to a law library. *Casey v. Lewis*, 43 F.3d 1261 (9th Cir. 1994). This is based in part on the lower courts' failure to limit the scope of access to courts to the filing of habeas corpus petitions and civil rights complaints. The lower courts' decisions are explicitly based only on the language used by this Court in *Bounds v. Smith*, 430 U.S. 817, 828 (1977) that requires prison officials to "assist inmates in the preparation and filing of *meaningful* legal papers. . . ." (emphasis added).

As noted by petitioners, in order to provide "meaningful" access Arizona prison officials have been ordered to:

Open their law libraries between 50 to 80 hours per week, including night and weekend hours, regardless of demand;

Provide fully equipped law libraries at every prison unit that has a capacity of 150 or more inmates;

Hire full-time, professionally trained librarians with law or paralegal degrees for every law library;

Provide extensively trained inmate legal assistants to all inmates, even if the inmates are literate and have physical access to a law library;

Provide a legal assistant training program, including a legal research course of approximately 60 hours in length to be taught by lawyers, law students, or trained paralegals at each law library twice a year;

Provide a weekly minimum of three 20-minute telephone calls to an attorney, an attorney representative, or a legal organization;

Purchase a complete up-to-date set of regional reporters and digests, in addition to state reporters and digests, for each law library;

Allow inmates to regulate the time, place and manner in which they gain access to and utilize the law library and legal assistants; and

Allow inmates direct access to browse in the library stacks, unless prison officials can first document an actual security risk.

In California alone there are currently 29 prisons border to border across a state of 159,000 square miles.

The state incarcerates more than 126,000 inmates. To comply with the order affirmed by the Court of Appeals in this case, California would have to add an unprecedented amount of library facilities and staff and make substantial operation changes, all at a significant cost and risk to prison security.

A typical California prison houses approximately 4,000 inmates in about four semi-autonomous facilities. To meet the library access requirement approximately four new full libraries would have to be opened at every prison for a total of at least 116 prison libraries. An equal number of qualified librarians would also have to be hired. California already has difficulty finding a sufficient number of qualified librarians to staff its existing libraries. Opening these additional libraries would likely require the conversion of existing inmate program space. If these libraries were to be open five days a week they would have to be available for inmate use 24 hours per day to fulfill the requirements of the order in this case.

The inmate legal assistance program prescribed by the lower courts would severely threaten prison security by placing the inmate assistants in a position of power and influence over the inmates they are assisting. The program also gives inmates power over the administrators by providing them with labor rights similar to prison employees.

Allowing inmates direct access to the library stacks may adversely affect the availability of books because they can more readily be destroyed by inmates without

any way of accounting for which inmate may have been responsible. Direct access also presents security problems in that inmates can easily pass notes to each through the unchecked use of the library books.

While the numbers may not be as great in the other Amici States, the impact of being compelled to comply with the standards set forth by the lower courts in this case would be proportionately severe on all Amici States, especially given that the number of cases filed in 1993 rose by 14 percent and inmate filings rose by 10 percent even without the solicitude shown by the Ninth Circuit in the instant case. Rehnquist, 1993 *Year-End Report on the Federal Judiciary* (1994) at 5, fn. 2.

REASONS FOR GRANTING THE PETITION

Introduction

This case presents important questions of federal law which have not been, but should be, settled by this Court concerning the scope of the duties of prison officials under *Bounds v. Smith*, 430 U.S. 817. In addition, many portions of the decision of the Court of Appeals conflict with this Court's decision in *Bounds*.

Dissenting in *Bounds*, then-Justice Rehnquist wrote that the majority's analysis "places questions of prisoner access on a 'slippery slope. . . .'" *Id.* at 837. While the present case clearly represents the extreme, the divergent views of the courts in cases decided after *Bounds* demonstrate the need for further clarification and analysis.

In *Bounds*, this Court held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Id.* at 828. " 'Meaningful access' to the courts is the touchstone." *Id.* at 823, quoting *Ross v. Moffitt*, 417 U.S. 600, 616 (1974). The Court noted that its "main concern" was " 'protecting the ability of an inmate to prepare a petition or complaint.' " *Id.* at 828, n.17, quoting *Wolff v. McDonnell*, 418 U.S. 539, 576 (1974).

The Court of Appeals for the Eleventh Circuit aptly noted that "*Bounds* was a limited decision" which was the "culmination of a series of cases holding that imprisonment should not deprive persons of access to courts." *Hooks v. Wainwright*, 775 F.2d 1433, 1436 (11th Cir. 1985), cert. denied, 479 U.S. 913 (1986). Summarizing *Bounds* and the decisions on which it was based, the Eleventh Circuit stated:

All of these decisions simply removed barriers to court access that imprisonment or indigency erected. They in effect tended to place prisoners in the same position as non-prisoners and indigent prisoners in the same position as non-indigent prisoners.

Id. at 1436.

The decision in the current case is the complete antithesis of a "limited" decision. Seizing on the word "meaningful," the Ninth Circuit greatly expands the right of access to courts for prisoners beyond anything either

held or suggested in the *Bounds* opinion.¹ Certiorari should be granted to address the following issues of great importance:

1. The opinion in *Bounds* states repeatedly that the right of access to courts encompasses only the filing of habeas corpus petitions and civil rights complaints. See *id.* at 823 (discussing holding in *Johnson v. Avery*, 393 U.S. 483, 489 (1969) that ban on inmate assistance effectively prevented some prisoners from preparing petitions to challenge legality of their confinement and extension of that holding to civil rights actions in *Wolff v. McDonnell*, 418 U.S. at 577-580); 825 ("inquiry is rather whether law libraries or other forms of legal assistance are needed to give prisoners a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts" and discussion of basic requirements for filing of habeas corpus petition or civil rights complaint); 827 ("in this case, we are concerned in large part

¹ The expansive nature of the order in this case concerning access to courts involves the federal judiciary in a broad range of prison operational issues. In *Murray v. Giarratano*, 492 U.S. 1, 11 (1989), this Court noted that the constitutional origin of the right of access to courts is still shadowy. "The prisoner's right of access has been described as a consequence of the right to due process of law, see *Procunier v. Martinez*, 416 U.S. 396, 419 (1974), and as an aspect of equal protection, see *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987)." *Id.* at 11, n.6. Indeed, in *Bounds*, each of the dissenting opinions questioned whether there was any constitutional right of access to court. *Bounds*, 430 U.S. at 834-835 (Burger, C.J., dissenting), 836-837 (Stewart, J., dissenting), 837-841 (Rehnquist, J., dissenting). Amici submit that a constitutional right of such questionable underpinnings and scope should not form the basis of such a gross intrusion into prison administration.

with original actions seeking new trials, release from confinement, or vindication of fundamental civil rights" and emphasizing that "habeas corpus and civil rights actions are of 'fundamental importance . . . in our constitutional scheme . . . '"; 828 n.17 ("our main concern here is 'protecting the ability of an inmate to prepare a petition or complaint.'").

The decision in this case fails to recognize the limited scope of the constitutional right of access to courts. While the Court of Appeals never expressly states that the right encompasses more than the filing of petitions for writs of habeas corpus and civil rights complaints, its expansive view is implicit throughout the opinion. For example it affirms the district court's requirement that defendants offer a 30-40 hour videotape instruction course for all prisoners. The district court required that

Doctrinal areas of most concern to prisoners should be covered, including 42 U.S.C. Section 1983 and other major civil rights laws; prison practices, including disciplinary and classification measures; *relevant tort and civil law, including immigration and family issues*, and relevant areas of criminal procedure, including appeals, collateral attacks, Habeas Corpus and time computations.

Casey, 43 F.3d at 1277 (emphasis added).

This Court should grant certiorari to resolve the critical issue of the scope of the right of access to courts.

2. In *Bounds*, this Court expressly held that prison officials could satisfy their duty of providing access to courts either by providing access to an adequate law library or by providing prisoners with assistance from

persons trained in the law. Discretion was to be afforded prison officials in choosing whether to select one of those alternatives or some combination of books and trained staff. *Bounds*, 430 U.S. at 828, 830-831. The decision in this case obliterates that discretion and micro-manages the prisons in the name of access to courts. It requires that every library employ staff who possess a law or a paralegal degree. *Casey*, 43 F.3d at 1268, 1275. These highly trained professionals must be available to assist all inmates.² *Id.* at 1267-1268.

In *Hooks v. Wainwright*, 775 F.2d at 1436, the Court of Appeals stated that the facts that many prisoners are illiterate and that non-lawyers cannot provide those inmates with the same level of assistance as lawyers are so obvious that "[i]t presses credulity to contend that the Supreme Court in *Bounds* intended that there would be a constitutional right to legal counsel, if it were found that some prisoners were illiterate and that non-lawyers could not use the libraries as well as lawyers." Nevertheless the Ninth Circuit in this case, as well as several other courts, have found that prison officials must provide inmates with assistance from persons trained in the law. See generally, *Knop v. Johnson*, 977 F.2d 996, 1006 (6th Cir. 1992), cert. denied, *Knop v. McGinnis*, ___ U.S. ___, 113 S.Ct. 1415

² The Court of Appeals takes a very broad view of illiteracy, including within that category not only inmates who cannot read but also inmates who cannot read at a high school level. The Court of Appeals found that 35 percent of the inmates cannot read English above a seventh grade level and that 14.5 percent cannot speak English. *Id.* at 1270. Thus, under the decision in this case, prison officials must provide specialized legal assistance to as many as 50 percent of the prisoners.

(1993); *Valentine v. Beyer*, 850 F.2d 951, 956-957 (3d Cir. 1988); *Cruz v. Hauck*, 627 F.2d 710, 721 (5th Cir. 1980). The conflicting decisions of the appellate courts as well as the importance of this issue necessitate granting the petition in this case.

3. This Court has consistently recognized that even prisoners' constitutional rights must yield to the legitimate penological interests of prison administrators. E.g., *Turner v. Safley*, 482 U.S. 78, 89 (1987). In this case, the Court of Appeals failed to consider the legitimate interests of prison administrators in the safe and orderly running of the prisons when it uncritically upheld every aspect of an order that requires that all prisoners, with the exception of those found guilty of specific acts of misconduct, must not only be able to go to the law library but that prisoners must also be able to browse through the library stacks. *Casey*, 43 F.3d at 1266-1267.

There are two fundamental flaws in this holding. First, nothing in *Bounds* suggests that the use of a law library requires that a prisoner be physically present in the library itself. It is the access to the books themselves, not the physical plant, which is the key to meaningful access. Moreover, assuming that inmates must be allowed to visit the library, the requirement that they be allowed to browse through the stacks is nonsensical. Previous decisions of the Ninth Circuit and the Fourth Circuit have found that "legal research often requires browsing through various *materials* in search of inspiration. . . ." *Toussaint v. McCarthy*, 801 F.2d 1080, 1110 (9th Cir. 1986), cert. denied, 481 U.S. 1069 (1987), quoting *Williams v. Leeke*, 584 F.2d 1336, 1339 (4th Cir. 1978), cert. denied, 441 U.S. 911 (1979) (emphasis added). Browsing through materials

is quite different from browsing through library stacks. While a person may need to review a number of digests or case reporters to discover and develop a legal theory, this is not accomplished by strolling the aisles of a library. Thus, there is simply no basis for the order requiring prison officials to permit inmates the freedom to roam through the library stacks.

Assuming *arguendo* that a right might be found to go to the library and to browse through the stacks, the Ninth Circuit erred when it failed to consider any reasonable security or operational concerns of prison officials as required under *Turner*. This Court should grant certiorari to determine with unmistakable clarity 1) whether inmates have a right to physical access to a law library; 2) if so, whether that right includes browsing through the library stacks; and 3) if these rights exist, whether they are outweighed by prison officials' legitimate security concerns.

4. The prior decisions of this Court have not recognized that prison officials have some constitutional duty to assist inmates in obtaining access to courts beyond preparing a petition or complaint. *Bounds*, 430 U.S. at 828, n.17; *Wolff*, 418 U.S. at 576. Accordingly, at least two circuits have held that the state's affirmative obligation to assist prisoners in the preparation of legal papers ends after the filing of an initial petition or complaint. *Bee v. Utah State Prison*, 823 F.2d 397, 398-399 (10th Cir. 1987); *Carter v. Fair*, 786 F.2d 433, 435-436 (1st Cir. 1986). The decision of the Court of Appeals in this case fails to recognize any limits on the constitutional duty of state prison officials to assist state prisoners to file lawsuits

against the same state officials. This Court should grant certiorari to resolve this important issue of law.

5. Several circuits, including two prior panels of the Ninth Circuit, have held that prisoners challenging the adequacy of a legal access policy bear the burden of showing that the prison's policies resulted in an instance in which the prisoner was actually denied access to a court. *Vandelft v. Moses*, 31 F.3d 794, 796 (9th Cir. 1994); *Shango v. Jurich*, 965 F.2d 289, 292-293 (7th Cir. 1992); *Sands v. Lewis*, 886 F.2d 1166, 1171 (9th Cir. 1989); *Peterkin v. Jeffes*, 855 F.2d 1021, 1041 (3d Cir. 1988). The Court of Appeals in this case, for reasons left unknown, stated that the issue of actual injury was not before it, although the issue had been raised by the prison officials. *Casey*, 43 F.3d at 1267 n.3. In the cases cited above, however, the courts were of the view that for any access issue other than the core issues of *Bounds* – adequacy of the library or legal assistance – the prisoner always bears the burden of proving an actual injury. Certiorari should be granted to resolve the issue of whether proof of a violation of access to courts – other than the core *Bounds* issues – always requires that the prisoner demonstrate that he or she has actually been denied access to courts.

6. Critical to this Court's affirmance of the lower court's judgment in *Bounds* was its observation that, following a finding that the prison administrators had violated the inmates' right of access to courts, "the courts below scrupulously respected the limits in their role." 430 U.S. at 832. This Court noted that the district court in *Bounds*

did not thereupon thrust itself into prison administration. Rather, it ordered petitioners themselves to devise a remedy for the violation, strongly suggesting that it would prefer a plan providing trained legal advisors. Petitioners chose to establish law libraries, however, and their plan was approved with only minor objections over the strong objections of respondents.

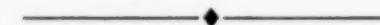
Id. at 832-833. In the years since *Bounds* was decided, this Court has continually reaffirmed the deference owed to prison officials in the administration of this nation's prisons. *E.g.*, *Turner v. Safley*, 482 U.S. at 89; *Bell v. Wolfish*, 441 U.S. 520, 550 (1979).

The courts in this case have also expressed a clear preference for the use of legal assistants. *Casey*, 43 F.3d at 1268. Rather than defer to the discretion of prison administrators, however, they have fully directed the operation of virtually all aspects of the administrators' law library program.³ The district court's order in this case involves it in such minutiae as setting the hours in which libraries must be open, including evening and weekend hours; procedures for the collection of legal access requests;

³ In noting what it sees as the advantage of having legal assistance over libraries alone, the Court of Appeals refers to the possibility of mediation of prisoner complaints that currently place a burden on it. *Id.* at 1268 n.6. Amici States are well aware of the burdens placed on them and on the courts in which they practice by the ceaseless growth of inmate litigation. Whatever the merits of a proposal to control the burden on the courts, it simply cannot form any basis for an injunction arrogating to the federal courts the discretion properly vested in prison officials.

preparation of written guides for use of the library; credentials for a law librarian; strict selection and retention criteria for trained legal assistants; and minimum times and durations of telephone calls to attorneys. *Id.* at 1272-1283.

It appears that the entire basis for the Court of Appeals' affirmance of the district court's order is that the provisions of that order are required to provide meaningful access to courts under *Bounds*. It is not clear from the opinion whether the Court of Appeals has determined that each and every aspect of the district court's order is required to provide meaningful access under *Bounds* or whether the Court of Appeals determined that once a court finds that inmates have been denied access to courts it is free to choose whatever remedy will most easily maximize access. This Court should grant certiorari to clarify that the components of a legal access system ordered by the lower courts are not required by *Bounds*. This Court should also clarify that even a violation of prisoners' right of access to courts does not divest prison officials of all discretion to develop and implement an adequate system of access.



CONCLUSION

For the reasons stated above and in the Petition for Writ of Certiorari, the Petition should be granted.

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